

No. 12478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTARY BRIEF.

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AUG 10 1950

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APPELLEE'S SUPPLEMENTARY BRIEF.

Introductory Statement:

The jurisdictional statement, statement of the case, and statement of the statutes and regulations involved, in this appeal, are contained on pages 1-6 of Appellee's Reply Brief. The purpose of this brief is to acquaint the Appellant and the Court with further argument to be advanced by the Appellee on hearing.

ARGUMENT.

The Motion of Appellant for Relief Under the Provisions of Section 2255 of Title 28, United States Code, Is Premature.

It is the contention of the Government that the Appellant may not *at this time* prosecute his appeal under the provisions of Section 2255 of Title 28, United States Code, because by the clear wording of the statute the remedy is available only in those instances where the Appellant seeks to attack the sentence he is then serving. Appellant seeks relief from a sentence he will not commence to serve until April 20, 1953. He was sentenced on April 20, 1948, in Case Number 19821, to five years imprisonment [Tr.¹ 7], and on the same date was given the one year sentence he now attacks, which is to be served at the expiration of the five year term [Tr. 29]. This feature of Section 2255 is not novel, for it is clear that the Writ of Habeas Corpus would not be available to Appellant to attack this one year sentence at this time, *McNally v. Hill, Warden*, 293 U. S. 131, 79 L. Ed. 238; *Holiday v. Johnston*, 313 U. S. 342, 85 L. Ed. 1392.

These considerations distinguish this appeal from *Martyn v. United States*, 176 F. 2d 609, and *Ex parte Atkinson*, 84 Fed. Supp. 300, which were appeals under Section 2255, relied upon by Appellant. The Court in each of these cases released the Appellant from custody after

¹References preceded by the letters "Tr." are to the typewritten "Transcript of Record."

ruling that Appellant was *then serving* a sentence wrongfully imposed. *Griffen v. United States*, 173 F. 2d 909; *United States v. Weil*, 46 Fed. Supp. 323; *Waldron v. United States*, 146 F. 2d 145; *Rutkowski v. United States*, 149 F. 2d 481; and *United States v. Coy*, 57 Fed. Supp. 661, also cited by Appellant, do not involve Section 2255.

It may appear that the Appellant is subjected to hardship by being denied anticipatory relief of the nature he here seeks, in that the imposition of the one year sentence operated to deprive Appellant of any consideration for parole during his five year term. But it must be assumed that the sentencing Court intended that Appellant serve a full five year sentence, and would have imposed sentence accordingly had Appellant been sentenced only in Case Numbered 19821.

Respectfully submitted,

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